

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Lotus Communications Corporation)	File Number EB-04-LA-085
)	
Registrant of Antenna Structure)	NAL/Acct. No. 200432900008
ASR # 1015922)	FRN 0001529171
Los Angeles, California)	

FORFEITURE ORDER

Adopted: June 27, 2005

Released: June 30, 2005

By the Regional Director, Western Region, Enforcement Bureau:

I. INTRODUCTION

1. In this *Forfeiture Order* ("Order"), we issue a monetary forfeiture in the amount of ten thousand dollars (\$10,000) to Lotus Communications Corporation ("Lotus"), registrant of antenna structure # 1015922, in Los Angeles, California, for repeated violations of Section 303(q) of the Communications Act of 1934, as amended, ("the Act"),¹ and Sections 17.21(a), 17.47, 17.48 and 17.49 of the Commission's Rules ("Rules").² On September 29, 2004, the Commission's Los Angeles Office issued a *Notice of Apparent Liability for Forfeiture* ("NAL") in the amount of \$10,000 against Lotus after determining that Lotus had repeatedly failed to comply with the antenna structure lighting, monitoring and notification requirements specified for antenna structure # 1015922. Such failure by Lotus created a public safety hazard that Lotus was unaware of until notified by a Commission agent. In this *Order*, we consider Lotus' arguments that its conduct, and compliance history, do not warrant a \$10,000 forfeiture.

II. BACKGROUND

2. On March 22, 2004, the Los Angeles Police Department ("LAPD") notified its flight crews of tower light outages on towers near the intersection of Martin Luther King Boulevard and Coliseum Street in Los Angeles, California. On March 23, 2004, the LAPD sent a complaint to the FCC concerning the tower light outages and, later on March 23, 2004, a field agent from the Los Angeles Office inspected antenna structure # 1015922, located at 4557 Martin Luther King Boulevard, Los Angeles, California.³ Lotus is the registered owner of the antenna structure. Lotus is also the licensee of KWKW(AM) which broadcasts from the antenna structure array. The antenna structure is required to have "Obstruction Marking and Lighting" in accordance with the applicable paragraphs of FCC Form 715/715A.⁴ Specifically, the structure is required to have a flashing red beacon mounted on the top of the antenna structure.⁵ On levels at approximately two-thirds and one-third of the overall height of the structure, there

¹47 U.S.C. § 303(q).

²47 C.F.R. §§ 17.21(a), 17.47, 17.48 and 17.49.

³This antenna structure is designated as tower two (2TA2) of a two-tower transmitting array. The other tower of this array is ASR # 1015921, also registered to Lotus.

⁴FCC Forms 715/715A Paragraphs 1, 3, 12, 21.

⁵FCC Forms 715/715A, Paragraph 3.

is a requirement of at least two red obstruction lights.⁶ The lights on the structure are required to burn continuously or be controlled by a light sensitive device.⁷ During the inspection on March 23, 2004, the field agent observed that the antenna structure's top beacon and three of the four intermediate level side lights were not functioning. The field agent then contacted the Federal Aviation Administration ("FAA") and the FAA representative indicated that they had not previously been notified of the tower light outage for antenna structure # 1015922.⁸

3. On March 24, 2004, a field agent from the Los Angeles Office notified the Senior Vice President of Lotus that the lights on antenna structure # 1015922 were not functioning properly. The Lotus executive acknowledged that while station personnel are required to check the remote light indicator every night for Lotus, they sometimes failed to do the required checks. The executive also indicated that the remote automatic alarm system was no longer functioning because of a number of false alarms. On March 25, 2004, the Lotus executive contacted the field agent, thanked him for "notifying us of a problem," and stated that Lotus was "trying to develop ways [to] electronically back up the monitoring system," noting that the "biggest problem is operator error" The Lotus executive told the field agent that the light outages would be repaired by March 31, 2004. An inspection by the field agent on April 2, 2004, revealed that the extinguished lights on the tower were still not functioning. A subsequent inspection on April 9, 2004, showed that the lights had been repaired.

4. On April 6, 2004, an agent from the Los Angeles Office conducted an inspection of the station logs with the station engineer for KWKW(AM). The agent observed that the station logs for March 22, 2004, and March 23, 2004, did not note any outages concerning the antenna structure lights. Although Lotus, the licensee of KWKW(AM) was notified by the field agent on March 24, 2004, that the lights on the antenna structure were not functioning properly, the station logs from March 24, 2004, through April 2, 2004, continued to show no light outages on antenna structure # 1015922. The station engineer also stated to the field agent that the station personnel are unable to identify which tower has a lighting problem, because the automatic system monitors the combined current draw of both towers in the array.

5. On September 29, 2004, the Los Angeles Office issued a *NAL* in the amount of \$10,000 to Lotus.⁹ After being granted an extension, Lotus filed a response to the *NAL* on November 23, 2004 ("Response"). In its Response, Lotus does not dispute that the lights on antenna structure #1015922 were not functioning on the days cited in the *NAL*. Instead, Lotus argues that a forfeiture is unwarranted because the duration of the outage was merely a small percentage of the time that Lotus has owned the antenna structure and that Lotus has a history of "unblemished compliance" with the Commission's Rules. Lotus also argues that the violation was not willful. Finally, Lotus argues that because of its "compliance-oriented operating practices" and its "vigorous corrective action taken long prior to the issuance of the *NAL*," the applicable law does not support the proposed forfeiture and that such a forfeiture would be contrary to "sound public policy" and "would fail to serve any public purpose."

III. DISCUSSION

6. The proposed forfeiture amount in this case was assessed in accordance with Section

⁶FCC Forms 715/715A, Paragraph 12.

⁷The light sensitive device shall be "adjusted so that the lights will be turned on at a north sky light intensity level of about 35 foot candles and turned off at a north sky intensity of about 58 foot candles." FCC Forms 715/715A Paragraph 21.

⁸After a subsequent conversation with the field agent on March 23, 2004, the FAA issued a Notice to Airmen ("NOTAM") advising pilots of the light outage on the antenna structure.

⁹*Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200432900008 (Enf. Bur., Western Region, Los Angeles Office, released September 29, 2004).

503(b) of the Act,¹⁰ Section 1.80 of the Rules,¹¹ and *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087 (1997), recon. denied, 15 FCC Rcd 303 (1999) ("*Forfeiture Policy Statement*"). In examining Lotus' response, Section 503(b) of the Act requires that the Commission take into account the nature, circumstances, extent and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require.¹²

7. Section 303(q) of the Act states that antenna structure owners shall maintain the painting and lighting of antenna structures as prescribed by the Commission.¹³ Part 17 of the Rules is designed to promote air safety, by prescribing regulations for antenna structures that constitute or that potentially constitute "a menace to air navigation."¹⁴ Antenna structures that exceed 200 feet above ground level ("tall antenna structures") are deemed to constitute or potentially constitute such a menace.¹⁵ Section 17.21(a) of the Rules states antenna structures shall be painted and lighted when they exceed 60.96 meters (200 feet) in height above the ground or they require special aeronautical study.¹⁶ Antenna structure # 1015922 is 112.5 meters in height and is assigned FCC lighting specifications requiring that the structure have a red obstruction beacon mounted at the top of the antenna structure and at least two red obstruction lights on levels at approximately two-thirds and one-third of the overall height of structure. Lotus does not deny that the lights on the structure were not functioning, as described in the *NAL*, and acknowledges that the lights were not repaired until April 6, 2004.

8. Section 17.48 of the Rules requires the owner of any antenna structure which is registered with the Commission and has been assigned lighting specifications to report immediately by telephone or telegraph to the nearest Flight Service Station ("FSS") or office of the FAA any observed or otherwise known extinguishment or improper functioning of any top steady burning light or any flashing obstruction light, regardless of its position on the antenna structure, not corrected within 30 minutes. Lotus acknowledges that it was not aware of the light outages on the structure until notified by a Commission agent on March 24, 2004. Lotus further acknowledges that the required FAA notification was made by the Commission agent, and not Lotus, the antenna structure owner, as required by Section 17.48.

9. Section 17.47(a)(1) of the Rules requires the owner of any antenna structure which is registered with the Commission and has been assigned lighting specifications to make an observation of the antenna structure's lights at least once every 24 hours either visually or by observing an automatic properly maintained indicator designed to register any failure of such lights.¹⁷ Alternatively, Section 17.47(a)(2) of the Rules requires antenna structure owners to provide and properly maintain an automatic alarm system designed to detect any failure of such lights and to provide indication of such failure to the owner.¹⁸ Section 17.49 of the Commission's Rules requires the owner of each antenna structure which is

¹⁰47 U.S.C. § 503(b).

¹¹47 C.F.R. § 1.80.

¹²47 U.S.C. § 503(b)(2)(D).

¹³47 U.S.C. § 303(q).

¹⁴47 C.F.R. § 17.1(a).

¹⁵47 C.F.R. § § 17.7(a).

¹⁶47 C.F.R. § 17.21(a). See *Max Media of Montana, LLC*, 18 FCC Rcd 21375 (2003).

¹⁷47 C.F.R. § 17.47(a)(1).

¹⁸47 C.F.R. § 17.47(a)(2).

registered with the Commission and has been assigned lighting specifications to maintain a record of any observed or otherwise known extinguishment or improper functioning of a structure light and include information concerning the date, time and nature of the extinguishment or improper functioning; the date and time of FAA notification; and the date, time and nature of adjustments, repairs, or replacements made.¹⁹ Lotus states that in March 2004, it had a compliance program in place which included the requirement of a nightly check by KWKW station personnel of the remote light indicator, a monitoring device installed by Lotus to measure the electrical flow to the tower lights. This nightly check was backed up by periodic physical inspections of the tower lights by the KWKW Chief Operator.²⁰ Additionally, KWKW personnel were required to “notify management immediately of tower light malfunctions and to note such problems in the station’s transmitter log.” Lotus acknowledges that an omission by KWKW Station personnel to perform the required checks “derailed the system.” Because Lotus first learned of the outage on March 24, 2004, it admits that the transmitter log does not include any notification of the outage prior to that date. Lotus does not explain, however, why the subsequent logs do not reference the outages.

10. In general, Lotus does not deny that the incidents detailed in the *NAL* occurred. Instead, Lotus argues that its violations were not willful. We note that the Los Angeles Office did not find any apparent willful violation of the Communications Act and the Commission’s Rules. Rather, it found that Lotus apparently repeatedly violated the Communications Act and the Commission’s Rules. Because we find the violations to be repeated, we need not address Lotus argument that the violation was not willful.²¹ Lotus also argues that it took corrective action prior to the issuance of the *NAL*. We find this argument unpersuasive. The Commission has stated in the past that a downward adjustment for a forfeiture is not warranted when the corrections were made only after the Commission brought the violations to the violator’s attention.²²

11. Lotus also argues that a forfeiture is unwarranted because the duration of the outage was merely a small percentage of the time that Lotus has owned the antenna structure. The duration of Lotus’ ownership is immaterial given the duration of Lotus’ violation. Lotus does not deny that the duration of the violations listed above was more than one day, and, therefore, “repeated” according to the Act.²³ Because the stated purpose of the Part 17 Rules is the promotion of air safety, we find that long-time ownership of an antenna structure does not mitigate repeated violations of these important public safety rules.

12. Finally, and most vigorously, Lotus argues that it has a history of “unblemished compliance” with the Commission’s Rules, and that the issuance of a forfeiture against a Commission licensee with a 42 year record of unblemished compliance would be against public policy and serve no public purpose. We note that Lotus does not have an unblemished record of compliance with the Commission’s Rules, including the Commission’s antenna structure Rules. According to Commission records, on July 19, 2000, the Los Angeles Office issued a Notice of Violation (“NOV”) to Lotus concerning the antenna structure array that is the subject of the instant *NAL* because of Lotus’ failure to post

¹⁹47 C.F.R. § 17.49.

²⁰Lotus argues that contrary to the suggestion in the *NAL*, Lotus’ remote light indicator was fully operational when the events described in the *NAL* occurred. The non-functioning piece of equipment was a “remote automatic alarm system” which Lotus had installed to back up nightly inspections by KWKW station personnel of the remote light indicator.

²¹See Section 503(b)(1) of the Act, 47 U.S.C. § 503(b)(1) (violator liable for forfeiture if violation is willful or repeated).

²²*AT&T Wireless Services, Inc.* 17 FCC Rcd 21866, 21875-76 (2002).

²³47 U.S.C. § 312(f)(2).

correct antenna structure registration numbers at the site.²⁴ Additionally, antenna structures and radio stations owned by Lotus or its associated companies have been the subject of other NOV's concerning the Commission's antenna structure and emergency alert system ("EAS") Rules. Because Lotus does not have a history of overall compliance with the Communications Act and the Commission's Rules, we find Lotus' public policy argument meritless.

13. We have examined Lotus' response to the *NAL* pursuant to the statutory factors above, and in conjunction with the *Forfeiture Policy Statement*. As a result of our review, we conclude that Lotus repeatedly violated Section 303(q) of the Act, and Sections 17.21(a), 17.47, 17.48 and 17.49 of the Rules. Considering the entire record and the factors listed above, we find that neither reduction nor cancellation of the proposed \$10,000 forfeiture is warranted.

IV. ORDERING CLAUSES

14. **ACCORDINGLY, IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended ("Act"), and Sections 0.111, 0.311 and 1.80(f)(4) of the Commission's Rules, Lotus Communications Corporation **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of \$10,000 for repeatedly violating Section 303(q) of the Act, and Sections 17.21(a), 17.47, 17.48 and 17.49 of the Rules.²⁵

15. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Rules within 30 days of the release of this *Order*. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to Section 504(a) of the Act.²⁶ Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Acct. No. and FRN No. referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 358340, Pittsburgh, PA 15251-8340. Payment by overnight mail may be sent to Mellon Bank /LB 358340, 500 Ross Street, Room 1540670, Pittsburgh, PA 15251. Payment by wire transfer may be made to ABA Number 043000261, receiving bank Mellon Bank, and account number 911-6106. Requests for full payment under an installment plan should be sent to: Chief, Revenue and Receivables Group, 445 12th Street, S.W., Washington, D.C. 20554.²⁷

16. **IT IS FURTHER ORDERED** that a copy of this *Order* shall be sent by First Class Mail and Certified Mail Return Receipt Requested to Lotus Communications Corporation, 3301 Barham Blvd., Suite 200, Los Angeles, California 90068 and to Lotus Communications Corporation DBA = KWKW, 6290 Sunset Blvd., Suite 1600, Los Angeles, California 90028, and Jerome S. Boros, Esquire, Bryan Cave, LLP, 1290 Avenue of the Americas, New York, NY 10104.

FEDERAL COMMUNICATIONS COMMISSION

Rebecca L. Dorch
Regional Director, Western Region
Enforcement Bureau

²⁴See Section 17.4(g) of the Rules, 47 C.F.R. § 17.4(g).

²⁵47 U.S.C. § 303(q), 503(b), 47 C.F.R. §§ 0.111, 0.311, 1.80(f)(4), 17.21(a), 17.47, 17.48, and 17.49.

²⁶47 U.S.C. § 504(a).

²⁷See 47 C.F.R. § 1.1914.